

File w/
Court

SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
Criminal Division -- Felony Branch

2012 JUN 13 P 12:56

UNITED STATES OF AMERICA :
v. : Docket No. 2011 CF1 1426
BRIAN GAITHER : Judge William Jackson
Trial: November 19, 2012

MOTION TO SEVER DEFENDANTS AND
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Mr. Brian Gaither, through counsel, respectfully requests, pursuant to Superior Court Rule of Criminal Procedure 14, that this Honorable Court sever his trial from that of his co-defendant, Johnnie Sweet. Severance is required because the prejudice Mr. Gaither will suffer should his co-defendant's statement be introduced into evidence at a joint trial, because of the disparity in evidence of guilt that will be presented and trial and, because it is apparent that Mr. Sweet's defense will conflict and be irreconcilable with Mr. Gaither's defense and that he will act, therefore, as a second prosecutor should the trials be joined. Mr. Gaither requests a hearing on this Motion.

Procedural History

On January 24, 2011, Mr. Gaither was presented on a charge of second-degree murder. On November 2, 2011, Mr. Gaither was indicted on charges of *inter alia*, first-degree murder (felony murder) obstruction of justice and kidnapping. Trial is set for November 19, 2012.

Factual History

The government alleges that on or about August 2, 2010, Johnnie Sweet, Brian Gaither, Laurence Hassan, Cinthya Proctor, Anneka Nelson and Lancee Bell kidnapped Latisha Frazier and in the course of that kidnapping, killed her. The government alternatively alleges that Mr.

and in the course of that kidnapping, killed her. The government alternatively alleges that Mr. Sweet killed Ms. Frazier under a premeditated murder theory on August 2, 2010.

According to government discovery, it alleges that Mr. Sweet believed that Ms. Frazier stole money from him in the summer of 2010. Mr. Sweet, the government alleges, devised a plan to lure Ms. Frazier to his apartment so that they could physically punish her. Mr. Sweet devised this plan with his brother Laurence Hassan and some of his friends, Mdmes. Proctor, Nelson and Bell. The government contends that Ms. Frazier came to the apartment at Mr. Sweet's invitation and that the five individuals, along with Brian Gaither, assaulted her. The government asserts that at some point, Ms. Frazier lost consciousness and was gagged. The government believes that Ms. Frazier died from the restraints or from a chokehold prior to the restraint.

Mr. Sweet and Mr. Gaither both made statements to Metropolitan Police Detectives. Mr. Sweet's statement involves Mr. Gaither's and alleges that Mr. Gaither was present and actively participating in all of the aspects of this crime.

MEMORANDUM OF POINTS AND AUTHORITIES

I. THE GOVERNMENT'S INTENDED USE OF MR. SWEET'S STATEMENTS REQUIRES SEVERANCE OF THE DEFENDANTS BECAUSE A JOINT TRIAL WILL UNFAIRLY IMPLICATE MR. GAITHER IN VIOLATION OF HIS CONFRONTATION CLAUSE RIGHTS.

In *Bruton v. United States*, 391 U.S. 123, 137 (1968), the Supreme Court held that the Confrontation Clause requires severance when the government uses a statement by a non-testifying co-defendant that implicates the defendant.¹ Although the co-defendant's statements in

¹ Even in the absence of a Confrontation Clause problem – i.e., in situations in which the co-

Bruton directly implicated the defendant, the presence of a substantial risk that a co-defendant's statement will indirectly implicate the defendant also warrants severance. See *Foster v. United States*, 548 A.2d 1370, 1379 (D.C. 1988). In determining whether the introduction of a co-defendant's statement will create a "substantial risk" that the jury will use the statement against the defendant despite a limiting instruction, binding case law focuses on the degree of inference the jury must make in order to connect that statement to the defendant. See, e.g., *id.* at 1379; *Smith v. United States*, 561 A.2d 468, 474 (D.C. 1989). See also, *Maryland v. Gray*, 523 U.S. 185, 196-97 (1998) (co-defendant's statements that implicate defendant only inferentially can trigger severance under *Bruton*).

In the instant case, the government's use of Mr. Sweet's videotaped statement to the police will unfairly prejudice Mr. Gaither in a joint trial. "Motive is evidence of the commission of any crime." *United States v. Bradshaw*, 690 F.2d 704, 708 (9th Cir. 1982). Without Mr. Gaither's statement, the government has little evidence linking the alleged acts to Mr. Gaither. Moreover, Mr. Sweet's statements, some of which may be challenged by Mr. Gaither, are inextricably intertwined with accusations that Mr. Gaither was also involved. Indeed, Mr. Sweet minimizes his own conduct by placing more blame on Mr. Gaither. Mr. Sweet's statement will place before the jury substantial evidence of the commission of both the alleged murder and tampering with evidence as well as the motive for those actions. It seems difficult to imagine how a jury would be able to ignore the statement when evaluating Mr. Gaither's guilt; indeed, to do so would be to ask the jury to focus on Mr. Sweet's statement when considering Mr. Sweet's involvement, motive, his presence at the scene during the assault, his presence at the scene

defendant making the out-of-court statement also testifies at trial – the extrajudicial statement of one defendant remains inadmissible hearsay against another, and the prejudice created by the presentation of such a statement still mitigates in favor of severance. *Carpenter v. United States*, 430 A.2d 496, 503 (D.C. 1981).

during the tampering, but completely ignore the statement when evaluating those exact same issues with regard to Mr. Gaither.

The introduction of Mr. Sweet's statement thus places Mr. Gaither in precisely the situation that was present in the *Bruton* case itself: although the statement will undoubtedly prejudice Mr. Gaither in the minds of the jurors by providing him with a motive to commit the charged acts, by establishing his presence at the scene of the crime, and by proving that Mr. Gaither participated in the tampering of evidence, he will have no opportunity to test the credibility of the statement through cross-examination of its author. *See Bruton*, 391 U.S. at 136. Because of the damaging impact of such evidence on Mr. Gaither's interests at trial, and because of the difficulty any fact-finder would have in disregarding Mr. Sweet's statement as evidence against Mr. Gaither, the Court should sever Mr. Gaither's trial from that of Mr. Sweet. *See id.* at 137.

II. THE STRENGTH OF THE EVIDENCE AGAINST MR. SWEET WILL UNFAIRLY PREJUDICE MR. GAITHER IN A JOINT TRIAL.

The evidence that the government intends to introduce against Mr. Gaither's co-defendant in this case appears clearly and significantly more inculpatory than the evidence it intends to introduce against Mr. Gaither. While Mr. Sweet is alleged to having motive, being present for the decedent's death, and attempting to chop up her body, Mr. Gaither denied sharing motive, denied being present for decedent's death or for the attempt to dismember.

Although severance is not required "merely because evidence against one defendant is more damaging than evidence against the other," *Johnson v. United States*, 596 A.2d 980, 987 (D.C. 1991), severance is required where the evidence against one defendant is so much more damaging than the evidence against the other that the disparity unfairly raises the specter of guilt by association. *See United States v. Mardian*, 546 F.2d 973, 979-81 (D.C. Cir.1976); *Hawthorne v.*

United States, 504 A.2d 580 (D.C. 1986). Mr. Gaither faces that situation in this case, as the evidence against him is *de minimis* when compared with the evidence against the co-defendant. *See id.* In order to protect Mr. Gaither fundamental rights at trial, the Court should therefore sever his trial from that of Mr. Sweet.

V. THE TRIAL OF MR. GAITHER MUST BE SEVERED FROM THE TRIAL OF MR. SWEET'S BECAUSE THEY WILL PRESENT CONFLICTING AND IRRECONCILABLE DEFENSES.

Rule 14 allows the Court to sever properly joined defendants in order to avoid prejudice to one defendant's position at trial. The presentation of "mutually antagonistic" or "irreconcilable" defenses by co-defendants often creates enough of this type of prejudice to mandate the severance of the defendants at trial. *Zafiro v. United States*, 506 U.S. 534, 538 (1993). For several reasons, the likely presentation of mutually antagonistic defenses in this case warrants severance of Mr. Gaither's case from that of Mr. Sweet.

A. The Likely Presence of a "Second Prosecutor" Mandates Severance

Situations in which one defendant attempts to escape criminal liability by placing blame for the entire criminal act on his or her co-defendant provide the most extreme examples of the prejudice created when defendants present mutually antagonistic defenses. In these circumstances, counsel for one defendant essentially becomes the "second prosecutor" of the other, and the latter defendant must counter the evidence and theories advanced not only by the government, but also by the co-defendant. The presence of the "second prosecutor" so prejudices such a defendant as to virtually eliminate his opportunity for a fair trial unless severance occurs. *See United States v. Crawford*, 581 F.2d 489 (5th Cir. 1978) (trial court erred in not severing trials where each co-defendant's defense theory centered on a contention that the

other was solely responsible for the crime). *See also United States v. Romanello*, 726 F.2d 173, 177 (5th Cir. 1984) (cited in *Mitchell v. United States*, 569 A.2d 177, 182 n.4 (D.C. 1990)).

Based on the discovery provided, undersigned counsel's own investigation, and pre-trial hearings conducted in the instant case, undersigned counsel believes that a "second prosecutor" scenario will develop should the Court try Mr. Gaither in a joint trial with Mr. Sweet. The information available to undersigned counsel indicates that Mr. Sweet's defense will attempt to exonerate him by pointing an accusing finger at Mr. Gaither. Because Mr. Sweet's defense will attempt to portray Mr. Gaither as the primary actor in this incident, a substantial danger exists that the evidence and arguments presented by Mr. Sweet would provide the basis of the jury's conviction of Mr. Gaither. *See Mitchell*, 569 A.2d at 182; *Ready v. United States*, 445 A.2d 982, 987 (D.C. 1982).

Mr. Gaither will thus have to counter not only the evidence introduced by the government, but the significantly more compelling arguments and evidence presented by counsel for his co-defendant. In order to protect Mr. Gaither's right to a fair trial, the Court should sever his trial from that of the co-defendant charged in this case.

Superior Court Rule of Criminal Procedure 14 provides, *inter alia*, for relief from prejudicial joinder of defendants. While the Rule affords protection against all forms of prejudice which might arise from joinder of defendants, courts have recognized that "[p]erhaps the primary danger against which the rule is designed to guard is that of a [defendant] having to face what amounts to multiple prosecutors - the state and his co-[defendant's counsel]." *United States v. Clark*, 744 F.2d 1124, 1126 (5th Cir. 1984) (citations omitted) (discussing identical Federal Rule of Criminal Procedure).

Several analyses have developed governing the assessment of prejudice arising from the

antagonism of co-defendants at trial. The two principal categories of cognizable prejudice in this area are: 1) the prejudice arising from the presentation of “conflicting and irreconcilable defenses” and 2) the unfairness of exposing the defendant to a multiple attacks from both the government and the co-defendants; i.e., the “second prosecutor problem.”

The question whether severance is required by the co-defendant’s posture as a “second prosecutor” is analytically independent of the question of whether severance is required on the grounds of “conflicting and irreconcilable defenses.” Even where a court concludes that severance is not warranted under the “conflicting and irreconcilable defenses” line of authority, severance is nevertheless required where, as here, joinder of defendants deprives the defendant of a fair trial by introducing “what is in effect a second prosecutor into a case, by turning each co-defendant into the other’s most forceful adversary.” *Zafiro v. United States*, 506 U.S. 534, 544, 113 S.Ct. 933, 939 (1993) (Stevens, J., concurring in the judgment) (footnote omitted) (citing *United States v. Tootick*, 952 F.2d 1078, 1082 (9th Cir.1991); *United States v. Romanello*, 726 F.2d 173, 179 (5th Cir. 1984). See *United States v. Sheikh*, 654 F.2d 1057, 1066 (5th Cir. 1981) (“[T]he taking of an adversarial stance on the part of counsel for co-[defendant] may generate trial conditions so prejudicial to the co-[defendant] under attack as to deny him a fair trial.”).³

In *United States v. Tootick*, the Ninth Circuit further explained the manifestations of the prejudice arising from the co-defendant’s role as a “second prosecutor”:

Defendants who accuse each other bring the effect of a second prosecutor into the case with respect to their co-defendant. In order to zealously represent his client, each co-defendant’s counsel must do everything possible to convict the other defendant. The existence of this extra prosecutor is

³In this regard, courts that have considered the “second prosecutor” problem have done so independently of their consideration of the issue of “conflicting and irreconcilable defenses.” See, e.g., *Mitchell*, *supra*; *United States v. Wright*, 251 U.S. App. D.C. 276, 783 F.2d 1091 (1986); *United States v. Buena-Lopez*, 987 F.2d 657 (9th Cir. 1993); *Romanello*, *supra*; *Sheikh*, 654 F.2d at 1066.

particularly troublesome because the defense counsel are not always held to the limitations and standards imposed on the government prosecutor. Opening statements as in this case, can become a forum in which gruesome and outlandish tales are told about the exclusive guilt of the "other" defendant. In this case, these claims were not all substantiated by the evidence at trial. Counsel can make and oppose motions that are favorable to their defendant, without objection by the government.

Cross-examination of the government's witnesses becomes an opportunity to emphasize the exclusive guilt of the other defendant or to help rehabilitate a witness that has been impeached. Cross-examination of the defendant's witnesses provides further opportunities for impeachment and the ability to undermine the defendant's case. The presentation of the co-defendant's case becomes a separate forum in which the defendant is accused and tried. Closing arguments allow a final opening for co-defendant's counsel to portray the other defendant as the sole perpetrator of the crime.

Joinder can provide the individual defendants with perverse incentives. defendants do not simply want to demonstrate their own innocence, they want to do everything possible to convict their co-defendants. These incentives may influence the decision whether or not to take the stand, as well as the truth and content of the testimony.

The joint trial of defendants advocating mutually exclusive defenses produces fringe benefits for the prosecution. Joinder in these cases can make a complex case seem simple to the [Court]: convict them both.

The government's case becomes the only unified and consistent presentation. It presents the [Court] with a way to resolve the logical contradiction inherent in the defendants' positions. While the defendants' claims contradict each other, each claim individually acts to reinforce the government's case. The government is further benefited by the additive and profound effects of repetition. Each important point the government makes about a given defendant is echoed and reinforced by the co-defendant's counsel.

Tootick, 952 F.2d at 1082.

Severance is mandated here under what the District of Columbia Court of Appeals has termed the "fair trial standard" for assessing prejudice arising from the co-defendants' posture as a second prosecutor. *See Mitchell v. United States*, 569 A.2d 177, 182 n.4 (D.C. 1990) (discussing *Sheikh, supra*, at 1066, and *Romanello, supra*, at 179).

Counsel expects that the government may contend, *inter alia*, that Mr. Gaither "fac[ing an]

extra prosecutor in the guise of co-[defendants'] counsel,” *Romanello, supra*, at 179, does not require severance, because all of the arguments and evidence proffered by the co-defendant would in any event be presented against Mr. Gaither by the government whether Mr. Gaither were tried jointly with the co-defendant or alone at a separate trial. Undersigned counsel respectfully submits that any such argument would in significant respects misconstrue the “second prosecutor” problem. While the prejudice engendered by the adversarial stance of the co-defendants is enhanced by the prospect that the co-defendants may offer evidence against Mr. Gaither beyond that offered by the government, that prejudice is in no way dependent upon the co-defendants offering such additional evidence. Indeed, one significant feature of the “second prosecutor” problem is precisely the prejudice generated where, as here, “[T]he government is further benefitted by the additive and profound effects of repetition [as] [e]ach important point the government makes about a given defendant is echoed and reinforced by defense counsel.” *Tootick*, 952 F.2d at 1082.

The multiple attacks upon Mr. Gaither here will dominate virtually every stage of a joint trial. Should the co-defendant, for example, choose to give an opening statement, the trial will begin with not one, but two statements forcefully arguing Mr. Gaither’s guilt. The testimony of each government witness implicating Mr. Gaither will be presented numerous times, first through the government’s direct examination, and again through cross-examination by counsel for the co-defendant. Similarly, the testimony of any witness the co-defendant might call which inculpates Mr. Gaither would presumably be elicited again and again in both direct examination and/or cross-examination by other counsel and the government. *See id.*

In sum, counsel for the co-defendant will become the “government’s champion against [Mr. Gaither],” creating “intolerable” prejudice and compelling the conclusion that “[a] fair trial [is] impossible under the circumstances.” *Romanello, supra*, at 181-82.

Undersigned counsel notes finally that unlike the standard for severance on the grounds of "conflicting and irreconcilable defenses," the criteria for severance under the fair trial standard do not in the first instance call for an assessment of the strength of the government's case. *See e.g., id.*, at 181. Indeed, to a significant extent, the strength of the government's case against Mr. Gaither is irrelevant to the fair trial/second prosecutor analysis. Rather, that analysis is focused primarily on the strength and primacy to his defense of the co-defendant's "case" against the defendant. *See e.g., id.*

Whatever claims the government may make regarding the strength of its case, severance is appropriate here as a consequence of the posture of co-defendant's counsel as a second prosecutor.

WHEREFORE, for the reasons cited herein and any others that may appear to the Court, Mr. Gaither asks this Court to sever Mr. Gaither's trial from that of his co-defendant.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion has been served by hand to the Office of Assistant United States Attorney, Attention: Chris Kavanaugh, 555 Fourth Street, N.W., Washington, D.C. 20530, on the 12th day of January 2012 and James Rudisill, CJA Folder.


